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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN O. PHILBECK,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 06A01-0702-PC-91
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE BOONE SUPERIOR COURT
The Honorable Matthew C. Kincaid, Judge
Cause No. 06D01-0607-PC-85

August 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-petitioner John O. Philbeck appeals from the denial of his petition for post-conviction relief. Specifically, Philbeck argues that the post-conviction court erred by declining to award relief after it concluded that the sentence imposed by the trial court was illegal. Finding that Philbeck's sentence is illegal because it orders a habitual offender enhancement to be served consecutively to another habitual offender enhancement, and finding that relief is warranted, we reverse the judgment of the post-conviction court and remand with instructions to revise the sentencing order to reflect that Philbeck's habitual offender enhancements are to be served concurrently with one another.¹

FACTS

In 1998, Philbeck was serving a five-year sentence in the Department of Correction for class D intimidation and being a habitual offender under Cause Number 06C01-9603-DF-54 (DF-54). In August 1998, Philbeck was convicted by a jury of one count of class D felony intimidation and was found to be a habitual offender under Cause Number 06D01-9703-DF-17 (DF-17). At the DF-17 sentencing hearing, Philbeck was sentenced to three years for the intimidation conviction, and that sentence was enhanced by an additional four and one-half years based on the habitual offender finding. The trial court ordered the DF-17 sentence to be served consecutively to all other sentences, including the one Philbeck was serving for DF-54.

¹ We are handing down another opinion concerning Philbeck contemporaneously with this one. Philbeck v. State, No. 06A05-0702-PC-105 (Ind. Ct. App. Aug. 16, 2007). In that matter, we consider another consecutive habitual offender enhancement imposed by a trial court on Philbeck. We find that the sentence is illegal but affirm the post-conviction court's judgment because in that cause, Philbeck pleaded guilty and benefited as a result of the plea agreement. Slip op. at 7.

Philbeck directly appealed the DF-17 conviction, arguing that the trial court had erroneously admitted certain evidence and that his trial attorney was ineffective for failing to object to the admission of this evidence. We affirmed his conviction, finding the evidence to have been probative and properly admitted. Philbeck v. State, No. 06A05-9911-CR-491 (Ind. Ct. App. Oct. 5, 2000).

On May 23, 2001, Philbeck filed a pro se petition for post-conviction relief, which was later amended by counsel. The amended petition alleged that the imposition of consecutive habitual offender enhancements was illegal and that Philbeck's appellate counsel was ineffective for failing to raise the issue in the direct appeal proceedings. Following an evidentiary hearing, on December 27, 2006, the post-conviction court denied Philbeck's petition, concluding, in pertinent part, as follows:

2. There is no statutory authority allowing a habitual offender enhancement of a sentence arising out of a conviction following a jury trial to be served consecutively with another habitual offender enhancement. See I.C. 35-50-2-8[.]

3. A habitual offender enhancement following a trial by jury is thus improper even when a Petitioner's sentences are statutorily required to be served consecutively. See Smith v. State, 774 N.E.2d 1021, 1023-1024 (Ind. Ct. App. 2002)[.]

4. Here, Philbeck's sentence after trial by jury under [DF-17] could have been challenged on appeal as it is to be served consecutively with his sentence under [DF-54].

9. Here appellate counsel was not deficient as Philbeck's illegal sentence was not both significant and obvious from the face of the record and was not clearly stronger than those actually raised by appellate counsel.

10. Petitioner has not sustained his burden of proof that the Court of Appeals would have vacated Philbeck's habitual offender enhancement.

Appellant's App. p. 60-61. Philbeck now appeals.

DISCUSSION AND DECISION

As we evaluate Philbeck's challenge to the denial of his petition for post-conviction relief, we observe that the petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction procedures do not afford petitioners with a "super appeal." Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

It is well established, as conceded by the post-conviction court, that there is no statutory authority for habitual offender enhancements to be served consecutively to one another. I.C. § 35-50-2-8. Even more compelling, our Supreme Court has explicitly instructed that consecutive habitual offender enhancements are contrary to "the rule of rationality and the limitations in the constitution" and "the moral principle that each separate and distinct criminal act deserves a separately experienced punishment." Starks v. State, 523

N.E.2d 735, 736-37 (Ind. 1988). Therefore, consecutive habitual offender enhancements are illegal, and remain illegal even if a petitioner's sentences are statutorily required to be served consecutively. Smith v. State, 774 N.E.2d 1021, 1023-24 (Ind. Ct. App. 2002). Generally, the proper remedy for a defendant who receives consecutive habitual offender enhancements is to order that the enhancements be served concurrently with one another. Starks, 523 N.E.2d at 737.

Here, Philbeck's sentence for DF-17 was enhanced because of his status as a habitual offender and was ordered to be served consecutively to his sentence under DF-54, which also included a habitual offender enhancement. It could not be clearer, therefore, that the DF-17 sentence is illegal to the extent that it was ordered to be served consecutively to his DF-54 sentence.

The State makes two arguments in the face of this well-established rule of law. First, even as it acknowledges that we are bound by Starks, it suggests that "that decision should be revisited." Appellee's Br. p. 6. Inasmuch as we have no authority to "revisit" opinions handed down by our Supreme Court, we decline this invitation.

Second, the State insists that Philbeck has waived this argument because he failed to raise it in his direct appeal. See Ben Yisrayl v. State, 738 N.E.2d 253, 258 (Ind. 2000) (holding that issues that were known and available but not raised on direct appeal are waived for post-conviction review). It is well settled, however, that "an illegal sentence is in the nature of a 'void' judgment and can be attacked directly or collaterally at any time." Hull v. State, 799 N.E.2d 1178, 1181 (Ind. Ct. App. 2003). Indeed, "we are duty bound to correct an

illegal sentence. A sentence in contravention of statutory authority constitutes ‘fundamental error’ and cannot be ignored by a court of review.” Id. (citation omitted). Consequently, the fact that Philbeck failed to raise this argument on direct appeal does not prevent us from considering it on post-conviction review. In fact, we are obligated to do so.

As noted above, the proper remedy under these circumstances is to order that the habitual offender enhancements be served concurrently with one another. We hereby remand this matter to the post-conviction court with instructions to revise the DF-17 sentencing order to reflect that the DF-17 habitual offender enhancement is to be served concurrently with the DF-54 habitual offender enhancement.²

The judgment of the post-conviction court is reversed and remanded with instructions.

BAILEY, J., and VAIDIK, J., concur.

² Inasmuch as we have awarded relief to Philbeck pursuant to his freestanding claim of error, we need not consider whether he received the ineffective assistance of appellate counsel.